83-1512

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NO.

in the
# Supreme Court
of the
# United States

MARCH TERM, 1984

ANTONIO IGLESIAS-URANGA,
*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## QUESTION PRESENTED FOR REVIEW

WHETHER A SEARCH AND SEIZURE ORDERED BY THE DRUG ENFORCEMENT ADMINISTRATION (DEA) REQUIRES THE AGENCY ACTUALLY PERFORMING THE SEARCH (IN THIS CASE, COAST GUARD) TO HAVE THE SAME DEGREE OF PROBABLE CAUSE NECESSARY AS IF THE REQUESTING AGENCY (DEA) HAD ACTUALLY PERFORMED THE SEARCH?

## LIST OF PARTIES

The caption of this cause lists all parties to this cause who are before this Court.

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## OPINION BELOW

The Opinion of the Eleventh Circuit Court of Appeals which gave rise to this Petition was rendered January 3, 1984 and is attached as Appendix A.

## JURISDICTION

The Opinion of the Eleventh Circuit Court of Appeals was entered on January 4, 1984 and is attached as Appendix A. No rehearing was requested or granted. This Petition for Certiorari was filed less than 90 days from the Opinion of the lower court. The jurisdiction of this Court is invoked under 28 U.S.C. Rule 20, Supreme Court Rules. The Eleventh Circuit Court of Appeals, in this case, has rendered an Opinion which is in conflict with the opinion of the Fifth Circuit Court of Appeals in *United States v. Guillen-Linares*, 636 F.2d 78 (5th Cir. 1981); *conviction reversed*, 643 F.2d 1054 (5th Cir. 1981).

## CONSTITUTIONAL PROVISION INVOLVED

### AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly discribing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

On December 11, 1981, the Coast Guard Cutter "Cape Fox", while on routine patrol in the area of Pavilon Key, Cape Romano and Cape Sabel, off the West Coast of Florida, received instructions from its District base to contact a Drug Enforcement Administration (DEA) airplane conducting surveillance activities. The "Cape Fox" contacted the DEA airplane and received instructions from the pilot of that airplane to divert from its present course and to intercept and board a vessel known as the "Miss Selena III". The DEA pilot provided the "Cape Fox" with the coordinates and location of the "Miss Selena III".

The DEA pilot did not provide the "Cape Fox" with any other information or any reason why the DEA had directed it to divert from its present course, and to intercept and board the "Miss Selena III".

As ordered, the "Cape Fox" diverted from its then present course, traveled 2½ hours, intercepted and boarded the "Miss Selena III".

Upon boarding the vessel, the odor of marijuana was noticed. Marijuana was found on the vessel its crew members were arrested.

The defendant's pre-trial Motion to Suppress was heard and denied.

The defendants were charged, tried and convicted of possession of marijuana with intent to distribute and conspiracy to possess marijuana with the intent to distribute.

The petitioner was sentenced to concurrent terms of 36 months imprisonment to be followed by a parole term of 2 years as to Count II.

The petitioner's conviction was affirmed on direct appeal to the Eleventh Circuit Court of Appeals which appeal was pursuant to 28 U.S.C. § 1291.

This petition follows.

## REASONS FOR GRANTING THE WRIT

### A SEARCH AND SEIZURE ORDERED BY THE DRUG ENFORCEMENT ADMINISTRATION (DEA) REQUIRES THE AGENCY ACTUALLY PERFORMING THE SEARCH TO HAVE THE SAME DEGREE OF PROBABLE CAUSE NECESSARY AS IF THE REQUESTING AGENCY (DEA) HAD ACTUALLY PERFORMED THE SEARCH.

As stated in the lower court opinion, the Coast Guard vessel, in this case, diverted from its previous course, traveled 2½ hours, then stopped, boarded and searched the instant vessel solely on instructions from a DEA airplane. The DEA plane gave no information, reasons, or factual bases why this vessel was to be pursued, intercepted, boarded and searched.

Agents of the Drug Enforcement Administration may search only upon specific articulable facts sufficient to warrant a finding of probable cause. See, *Bivens v Six Unknown Federal Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971); *United States v Craemer*, 555 F.2d 594 (6th Cir. 1977). For the Drug Enforcement

Administration to have validly stopped and searched the "Miss Selena III" (assuming they had the authority to do so on the high seas), it would have been required to show that it had the requisite probable cause to do so.

In this case, the Coast Guard was effectively the "arm" of and functioning as the DEA, operating as it was solely on DEA orders.

In the case of *United States v. Guillen-Linares, supra*, the Court found that, as members of the Coast Guard were acting under the direction of and in the capacity of Customs agents, the boarding by the Coast Guardsmen, acting in that capacity, must be viewed as and measured against the standards applicable to Customs agents. As the standards for a valid Customs boarding and search were absent, the search was found illegal and the evidence found ordered suppressed.

Similarly, in this case, the Coast Guard was acting as DEA agents, carrying out DEA orders for a DEA vessel stop and search. As there was no factual basis to support a finding of probable cause (the requirement for a DEA search), the evidence found should have been suppressed.

The lower court based its affirmance of the petitioner's conviction upon the case of *United States v. Ceballos*, 706 F.2d 1198 (11th Cir. 1983). In that case, a joint operation and boarding by Coast Guard-Customs Agents was effectuated. That boarding was based upon shared facts raising a suspicion of smuggling activities. The Coast Guard participated with Customs in the

planning of the mission. The Coast Guard officer had some imput in the decision to board. The search was upheld.

To the contrary, in this case, the boarding was not a result of joint planning. The Coast Guard was diverted from its previous course and pursued for hours before boarding. The Coast Guard was given no facts. It was told merely to intercept and board, which it did.

The sole reason for the boarding of this vessel was clearly revealed when the petitioner introduced into evidence the Coast Guard document relating the reason for that boarding. (Appendix B). The reason was "based upon information received by another law enforcement agency."

In this case, the Coast Guard acted as and, in fact, was a DEA vessel. It should be held to the standards of a DEA search, probable cause.

## CONCLUSION

Based upon the above facts, arguments, and authorities, the petitioner respectfully requests this Honorable Court to issue its most gracious Writ of Certiorari to review the instant opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the United States Attorney, 155 South Miami Avenue, Miami, Florida 33130 and to the Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, this _____ day of March, 1984.

_____

JOHN H. LIPINSKI, ESQ.

# Appendix

UNITED STATES of America,

*Plaintiff-Appellee,*

v.

Antonio IGLESIAS-URANGA, Alvin L. Gardner and Ezequiel Gomez-Castro,

*Defendants-Appellants.*

No. 82-5639

Non-Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.

Jan. 3, 1984.

Defendants were convicted before the United States District Court for the Southern District of Florida, Wm. M. Hoeveler, D. J., of marijuana-related offenses, and they appealed. The Court of Appeals held that: (1) findings that Coast Guard was not acting as agent of Drug Enforcement Administration and that captain of coast guard vessel made ultimate decision to board vessel at issue were not clearly erroneous, and (2) since Coast Guard had legitimate right to examine main beam number of vessel at issue and marijuana found came within plain view doctrine, officers then had probable cause to search vessel, seize it and arrest crew.

Affirmed.

1. Shipping —9

Notwithstanding that Drug Enforcement Administration instructed coast guard cutter to divert from its course and intercept and board vessel, finding that Coast Guard was not acting as agent of DEA and that captain of the coast guard vessel made ultimate decision to board were not clearly erroneous.

2. Arrest —63.4(14)

Drugs and Narcotics —182

Since Coast Guard had legitimate right to examine main beam number of boarded vessel and marijuana found on such vessel came within plain view doctrine, officers then had probable cause to search vessel, seize it, and arrest crew.

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Appeal from the United States District Court for the Southern District of Florida.

Before GODBOLD, Chief Judge, RONEY and TJOFLAT, Circuit Judges.

PER CURIAM:

Convicted of marijuana-related offenses in violation of 21 U.S.C.A. §§ 955a and 955c, Alvin Leon Gardner, Antonio Iglesias-Uranga and Ezequiel Gomez-Castro appeal on the sole ground that the district court should have suppressed evidence which resulted from a search of their vessel by the Coast Guard pursuant to 14 U.S.C.A. § 89(a). We affirm on the basis of our recent

opinion in *United States v. Ceballos*, 706 F.2d 1198 (11th Cir. 1983).

On December 11, 1981, the United States Coast Guard Cutter CAPE FOX was on routine law enforcement patrol in the area of Pavilion Key, Cape Romano and Cape Sabel, off the West Coast of Florida. The main office instructed the CAPE FOX to contact a Drug Enforcement Administration airplane conducting surveillance activities. The CAPE FOX contacted the DEA airplane and received instructions from the pilot of that airplane to divert from its present course, and to intercept and board a vessel known as the MISS SELENA III. The DEA pilot provided the CAPE FOX with the coordinates and location of the MISS SELENA III.

The DEA pilot did not provide the CAPE FOX with any other information or any reason why the DEA had directed it to divert from its present course, and to intercept and board the MISS SELENA III.

Approximately two and one half hours later the Coast Guard spotted the MISS SELENA III on the high seas. The Coast Guard observed the name of the vessel, that its home port was Key West, Florida, and the registry numbers. The Coast Guard chief also noticed that the vessel had a repainted waterline so it would not appear to be low in the water, the fishing nets were rolled up, and there was no visible fishing activity. The chief contacted the other vessel by radio, identified himself as the Coast Guard and advised that the Coast Guard was going to board the vessel. The decision to board the vessel was made by the Coast Guard captain.

Five Coast Guard personnel boarded the MISS SELENA III. The chief advised the crew that he was making a check for compliance with federal rules and regulations. The Coast Guard chief checked the vessel's papers and found them to be in order. He testified, however, that he had detected the smell of marijuana as soon as he stepped on board. During a routine walk of the vessel to make sure all persons were on the stern as instructed, a seaman observed marijuana. The Coast Guard chief asked to see the main beam number to verify the vessel's permanent number. When he went into the main cargo hold, he observed numerous bales of marijuana and detected its strong odor. The crew was placed under arrest and the vessel seized. A complete search of the vessel was then conducted during which more marijuana was found.

The appellants, relying upon *United States* u *Guillen-Linares*, 643 F.2d 1054, 1056-57 (5th Cir. 1981), argue that the Coast Guard was acting under the direction of and as the agents of the DEA when the stop and search were made. Therefore, it is asserted, the stricter standard of probable cause must be applied to the search rather than the less restrictive standard of the Coast Guard boarding statute, 14 U.S.C.A. §89(a). In *Guillen-Linares*, however, the district court found as a fact that the Coast Guard officers were acting in the capacity of Customs agents rather than as Coastguardsmen. *Id.* at 1055-56.

In *United States* u *Jonas*, 639 F.2d 200, 202 (5th Cir. Unit B 1981), the Fifth Circuit upheld a search where the district court found that the Coast Guard had a dual purpose for boarding and inspecting a vessel: to look for drugs and to make a safety and document inspection.

In a recent case, this Court had the opportunity to examine an allegedly pretextual search by the Coast Guard. In *United States v. Ceballos*, 706 F.2d 1198, 1200 (11th Cir. 1983), a Coast Guard officer accompanied three Customs officers aboard a Customs vessel on a mission. They encountered a suspicious vessel in international waters and all agreed that it should be boarded. The uniformed Coast Guard officer boarded first. The district court found that he boarded in the capacity of a Coastguardsman and that the boarding was therefore sustained under § 89(a). This Court, upholding the district court's finding against the clearly erroneous standard of review, affirmed in light of the Coast Guard officer's affirmative decision to board the vessel, his active participation in the boarding, and his compliance with his supervisor's instruction not to engage in any action not authorized by the Coast Guard statute.

[1] In the present case, the district court found that the Coast Guard officer boarded the MISS SELENA III for the dual purposes of checking compliance with safety and registration laws and looking for contraband. The court specifically found that the Coast Guard was not acting as an agent of the DEA and that the captain of the Coast Guard vessel made the ultimate decision to board. These findings are not clearly erroneous. The Coast Guard had only one contact with the DEA and that was to receive the coordinates of the vessel. The Coast Guard boarded alone and no representatives of the DEA were present. The Coast Guard officer found the boat to be suspicious without any contact with or prompting by the DEA.

[2] Once on board, the Coast Guard had a legitimate right to examine the main beam number, and the

marijuana found came within the plain view doctrine. *Ceballos*, 706 F.2d at 1201. The officers then had probable cause to search the vessel, seize it, and arrest the crew. The motion to suppress was properly denied.

AFFIRMED.

[280] believe his name was, that's what they did. And he testified right in here. He said, yeah, they had the MISS SELENA under observation, divert to conduct a boarding.

The Coast Guard officers did the DEA bidding. Okay. The DEA never had the Coast Guard of the United States saying why they wanted the vessel stopped and boarded; just that they should do it.

If you will note, your Honor, in Exhibit 2—well, I'm sorry. In Exhibit 2, which is now—I am incorrect—Government's Exhibit 17, it says: "Type of boarding; enforcement." You will note that none of the conditions are checked over here. Normal safety inspections are checked. None of those items are even alluded to in there.

In Exhibit—well, it was Defendants' Exhibit No. 3, I am not sure what it is now, but I assume it is Defendants' Exhibit 3 in evidence.

MR. O'DONNELL: It is still the same.

THE COURT: If it was offered by the defendant.

MR. EDEN: Yes, sir, we did offer it.

THE COURT: We have not gotten to your case yet.

MR. EDEN: I'm sorry. You are quite [281] right. Can we have a stipulation?

MS. CARNESOLTAS: I won't object, your Honor. I will stipulate.

THE COURT: All right.

MR. EDEN: I would like all the exhibits in as marked, I assume.

THE COURT: Yes, it will be marked.

MR: EDEN: On page 6 it has: "Ground purpose for stopping; boarding of the vessel." Okay. It has a list of things. The one checked is probable cause or reasonable suspicion of violations of law. Then it has some other documentation; fisheries and customs laws. None of those are checked.

Down below it has, "Other." I'm sorry. It has based upon information received by another law enforcement agency. I saw another page, if I may have a moment, your Honor.

THE COURT: All right.

MR. EDEN: At any rate, your Honor, taking Chief Wiezorek's testimony, and taking the report of boarding he filed, which is now Defendants' Exhibit 3 in evidence, it is clear that the Coast Guard, at the bidding and direction of the Drug Enforcement Administration, went out, stopped and seized the MISS SELENA, III.